No. 80-1711

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In the Supreme Court of the United States

OCTOBER TERM, 1980

STRUTHERS WELLS CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the Board properly found that petitioner violated the National Labor Relations Act by unilaterally changing the contractually established terms and conditions of employment through its failure to conduct the merit pay increase reviews required under the collective bargaining agreement and to grant such increases where warranted.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statute involved	2
Statement	2
Argument	3
Conclusion	7

TABLE OF AUTHORITIES

Cases:

Engineers & Fabricators, Inc. v. *NLRB*, 376 F. 2d 482 6

NLRB v. *H.E. Fletcher Co.*, 298 F. 2d 594 6

NLRB v. *Huttig Sash & Door Co.*, 377 F. 2d 964 3

NLRB v. *Majestic Weaving Co.*, 355 F. 2d 854 ..... 5, 6

NLRB v. *Scam Instrument Corp.*, 394 F. 2d 884, cert. denied, 393 U.S. 980 3

NLRB v. *Temple-Eastex, Inc.*, 579 F. 2d 932 5-6

NLRB v. *United Aircraft Corp.*, 490 F. 2d 1105 5

United States Postal Service v. *NLRB*, 614 F. 2d 384 6

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Page

Statute:

National Labor Relations Act, 29 U.S.C. 151 *et seq.* :

Section 8(a)(1), 29 U.S.C. 158(a)(1) 2, 3
Section 8(a)(5), 29 U.S.C. 158(a)(5) 2, 3
Section 8(d), 29 U.S.C. 158(d) 2, 3

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OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 1a) is noted at 636 F. 2d 1210 (table). The decision and order of the National Labor Relations Board (Pet. App. 2a-11a) are reported at 245 N.L.R.B. No. 150.

JURISDICTION

The judgment of the court of appeals was entered on December 3, 1980. A petition for rehearing was denied on January 5, 1981. The petition for a writ of certiorari was filed on Monday, April 6, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant sections of the National Labor Relations Act, 29 U.S.C. 158(a)(1), (a)(5), and (d), provide in pertinent part:

> Section 8(a) It shall be an unfair labor practice for an employer—
>
> > (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
> >
> > * * * * *
> >
> > (5) to refuse to bargain collectively with the representatives of his employees * * *.
>
> Section 8(d) * * * [W]here there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification * * * [gives timely notice] and continues in full force and effect * * * all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later.

STATEMENT

Petitioner and Local 186 of the Office and Professional Employees International Union entered into a collective bargaining agreement that was effective from November 1, 1977, to November 1, 1980. The agreement required petitioner to conduct merit reviews twice each year, in approximately May and November, to determine which of its employees were entitled to merit pay increases. (Pet. App. 3a.)

The Board, relying on an admission by petitioner's representative, found that in November 1977 petitioner failed to complete such merit reviews because of its economic situation and did not reach a final determination concerning merit increases at that time (Pet. App. 5a-6a). The Board concluded that petitioner's failure to comply with the requirements of the contract constituted a unilateral change in the contractually established terms and conditions of employment and thereby violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1) (Pet. App. 6a). The Board ordered petitioner to conduct the merit increase reviews it omitted in 1977, to determine under the standard customarily applied whether any employees were entitled to merit increases at that time, and to grant any such employees retroactive increases, with interest, effective the first payroll period beginning after December 1, 1977 (*id.* at 6a-8a).

By judgment order, the court of appeals upheld the Board's findings and enforced its order (Pet. App. 1a).

ARGUMENT

1. Petitioner does not contest that its failure to conduct the merit increase reviews required by the collective bargaining agreement, and to grant such increases where warranted, constituted a unilateral modification of the contractually established terms and conditions of employment and thus violated its bargaining obligation under the Act. See Section 8(d) of the Act, 29 U.S.C. 158(d); *NLRB* v. *Huttig Sash & Door Co.*, 377 F. 2d 964, 967-968 (8th Cir. 1967); *NLRB* v. *Scam Instrument Corp.*, 394 F. 2d 884, 887 (7th Cir.), cert. denied, 393 U.S. 980 (1968). Rather, it contends that the Board erred in finding a violation on a theory different from that litigated at the hearing before the administrative law judge (Pet. 2-6).[1] This contention turns on the

[1]The General Counsel argued that petitioner had determined under the contract to pay merit increases to three of the employees because

particular facts of this case and thus does warrant further reveiw.

At all events, petitioner's contention is without merit. Both the complaint and the bill of particulars gave sufficient notice of the issues to be determined by the Board, including the issue whether petitioner had fulfilled its contractual obligation to conduct merit reviews. Thus, the complaint, after setting out the requirements of the contract, alleged that petitioner was obligated to "review [employees' records] twice each calender year * * * to determine which [employees were] entitled to merit inceases" and that petitioner violated the Act by "unilaterally * * * repudiating its obligation to and refusing to grant merit review raises provided for in its collective-bargaining agreement with the Union" (Para. 9). The bill of particulars, which was provided at petitioner's request, further specified that petitioner "was obligated to review the records of all its employees to determine eligibility for merit review raises and grant merit review raises to those employees found eligible" and that petitioner "repudiated its contractual obligation to review the records of all its employees and

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they were told by Company supervisors that they would be receiving such increases. The administrative law judge accepted the General Counsel's theory of the case and concluded that petitioner had acted in derogation of the contract and of the Act by failing to give the merit increases provided for in the contract to these three employees. While the Board affirmed the administrative law judge's finding that petitioner had violated the Act, it rejected his rationale. The Board held that, regardless of the supervisors' representations, petitioner did not become obligated to pay merit increases to particular employees until higher management officials reached a final determination on the issue. However, relying on the testimony of Company Representative Raymond Marti that no final determination regarding merit increases for individual employees had been made in November 1977 (see page 5, *infra*), the Board concluded that petitioner had violated the Act by unilaterally abrogating the contractual obligation to conduct merit reviews at that time (Pet. App. 5a-6a).

grant merit review raises to those employees found eligible" (Paras. 1 & 2). In addition, during the hearing on the complaint, the administrative law judge specifically explained to petitioner's counsel that the issue to be decided in the case was not "whether [particular] individuals are entitled to an increase, but whether a determination had been made with regard to these individuals" (Tr. 77). Accordingly, petitioner was clearly on notice that the question of its compliance with the merit review provision of the contract was at issue in the case, and it was afforded a full opportunity to litigate that question and justify its actions.

Moreover, when Raymond Marti, the manager of industrial relations who was responsible for the merit reviews, testified that he had reviewed the employees but did not determine that any were entitled to merit increases (Tr. 24) the administrative law judge inquired (Tr. 24-25) whether this testimony meant that no employees were entitled to merit increases or that management had made no determination on the issue. Marti responded (Tr. 25) that "[w]e made no determination, I made no determination * * * the decision arrived at was to not grant merit increases." Petitioner could not help but be aware that such failure to reach a final determination on individual merit increases violated the collective bargaining agreement and thus could be the basis of an unfair labor practice finding.[2]

2. The cases on which petitioner relies (Pet. 7-10) are plainly distinguishable. Thus, in both *NLRB* v. *United Aircraft Corp.*, 490 F. 2d 1105, 1112 (2d Cir. 1973), and *NLRB* v. *Majestic Weaving Co.*, 355 F. 2d 854, 862 (2d Cir. 1966), the parties seeking review were able to show that they were precluded from presenting a proper defense and were therefore prejudiced by the Board's order. In *NLRB* v.

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[2]Even now, petitioner does not dispute Marti's testimony or suggest any other evidence it would have submitted on this issue.

Temple-Eastex, Inc., 579 F. 2d 932, 936-937 (5th Cir. 1978), the court found that an issue of material fact had been neither raised nor litigated in the proceeding; on that basis, the court denied enforcement of the Board's order because it was unable to determine whether the findings of the Board were supported by substantial evidence. Similarly, in *NLRB* v. *Majestic Weaving Co.*, 355 F. 2d 854, 861 (2d Cir. 1966), *NLRB* v. *H.E. Fletcher Co.*, 298 F. 2d 594, 600 (1st Cir. 1962), *Engineers & Fabricators, Inc.* v. *NLRB*, 376 F. 2d 482, 485 (5th Cir. 1967), and *United States Postal Service* v. *NLRB*, 614 F. 2d 384 (4th Cir. 1980), the courts found that material issues had never been raised or litigated. Here, by contrast, petitioner had full notice of the relevance of the issue of merit reviews, that issue was addressed during the hearing, and petitioner had an adequate opportunity to litigate it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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